No. 20526

United States
COURT OF APPEALS
for the Ninth Circuit

SCHNITZER STEEL PRODUCTS CO.,
a corporation,
Appellant,

v.

CIA. ESTRELLA BLANCA, LTD., as owner
of the SS NICTRIC, and AMTRO
CORPORATION, S.A.,
Appellees.

AMTRO CORPORATION, S.A.,
Cross-Appellant,

v.

SCHNITZER STEEL PRODUCTS CO.,
a corporation, and
CIA. ESTRELLA BLANCA, LTD.,
as Owner of the SS NICTRIC,
Cross-Appellees.

BRIEF OF APPELLEE CIA. ESTRELLA BLANCA, LTD.

Upon Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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STATEMENT OF THE CASE

Appellee adopts the designation of parties used in the appeal briefs of time charterer and the voyage charter-

er and in the trial court's opinion. Libelant-Appellee is designated as "Owners," the time charterer and Cross-Appellant as "Amtro" and the voyage charterer and Appellant as "Schnitzer."

Also, Owners adopt the statement of the case as made in Amtro's opening brief. Because Schnitzer's appeal is primarily on factual issues decided adversely to Schnitzer by the trial court, a further discussion of the facts will appear in the argument.

I

ANSWER TO SCHNITZER'S GROUP I ARGUMENT

The District Court Properly Construed the Voyage Charter Party to Place Primary Responsibility for Demurrage and Freight Upon Schnitzer

Schnitzer claims the trial court erred in its interpretation of the voyage charter. To sustain its argument, Schnitzer contends that the Court should ignore the specific language of the voyage charter, its authorship and Schnitzer's own interpretation and conduct and apply only the cesser clause, printed Clause 8 of the voyage charter. The trial court properly held that the charter must be construed in its entirety.

The voyage charter in this case (Ex. 2) is basically a printed form which goes under the code name "Gencon," but there were extensive changes typewritten on and over the printed form itself and a lengthy typewritten rider also attached. The original Gencon charter scheme (of which printed Clause 8 upon which Schnitzer relies is a part) can be understood more

clearly by reading it in the context of the other printed clauses of which Clause 8 was a part. To assist in making the analysis from the basic printed form to the form actually used by the parties here, Exhibit 75, an unmarked Gencon form, was introduced in evidence.

The relevant printed clauses of the basic Gencon form read as follows:

"6. Cargo to be received *by merchants* at their risk and expense alongside the vessel not beyond the reach of her tackle and to be discharged in ..... running working days. Time to commence at 1 P.M. if notice of readiness to discharge is given before noon, and at 6 A.M. next working day if notice given during office hours after noon.

"Time lost in waiting for berth to count as discharging time.

"7. Ten running days on demurrage at the rate of .... per day or pro rata for any part of a day, payable day by day, *to be allowed merchants* altogether at ports of loading and discharge.

"8. Owners shall have a lien on the cargo for freight, dead freight, demurrage and damages for detention. Charterers shall remain responsible for dead freight and demurrage (including damages for detention) incurred at port of discharge, but only to such extent as the owners have been unable to obtain payments thereof by exercising the lien on the cargo." (Emphasis added)

Thus, in the basic printed form, it was "merchants," i.e., cargo receivers, who, apart from Clause 8, were responsible for demurrage. To this, Clause 8 in the printed form added a degree of liability upon charterers for

freight and demurrage in the event owners were unable to exercise the lien granted in Clause 8. The purpose of this Clause was not to limit an otherwise existing liability since nowhere else in the basic printed form is the charterer made liable for freight or demurrage at all.

This entire pattern was wholly changed by the typewritten deletions and additions to the voyage charter in issue. Old Clause 6 and a part of old Clause 7 making "merchants" liable for demurrage as set forth above were stricken. The subject of old Clause 6 is now covered by the new typewritten Clauses 17 and 18 of the typewritten rider, which contain no reference to any obligation of the "merchants." In fact, Clause 17 places the responsibility for discharging the vessel squarely upon the charterer, not the receivers. Clause 18 contains an unqualified agreement that if the vessel is longer delayed, the charterer would pay the demurrage. These typewritten clauses are:

> "17. Cargo is to be loaded, stowed and discharged by the charterers, free of expense to the vessel.
>
> "18. Cargo is to be loaded, stowed and discharged within a total of twenty-three (23) weather working days of 24 hours, Sundays and holidays excepted unless used in which case actual time used to count. If longer detained charterers to pay demurrage at the rate stipulated in Clause 7 and payments to be made in the same currency of freight payment . . ."

Clause 7 in the original printed form quoted above was changed in the NICTRIC voyage charter by striking the old reference to "merchants" and inserting a

typewritten provision "Demurrage, if incurred, to be paid by charterers" so that Clause 7 in the charter in issue reads:

> "7. Demurrage, if incurred, to be paid by charterers at the rate of Seven Hundred Dollars ($700.00) per day or pro rata for any part of a day."

In these new typewritten provisions, twice repeated, once in Clause 7 and again in Clause 18, charterers (Schnitzer) assumed an unqualified obligation to pay demurrage. This is an obligation which did not exist in any form other than as a secondary liability under Clause 8, in the basic form of Gencon charter. The typewritten provisions expand and override the qualified obligation which was originally placed in the Gencon pattern.

This interpretation is further emphasized by the language provided in typewritten Clause 18 that payments of demurrage are "to be made in the same currency as freight payment." The typewritten language of Clause 1 of the NICTRIC charter relating to the rate of freight provides that the freight is to be paid in U. S. currency. Nowhere in its arguments does Schnitzer explain how receivers in Japan could be required to pay in U. S. currency.

Schnitzer also contends that it has avoided liability for the balance of freight (10%) which was agreed in the charter to be paid upon discharge. Schnitzer claims that the cesser clause likewise places the responsibility for the payment of this balance of freight upon the receivers, to be collected through the exercise of the lien.

However, here again the typewritten modifications of the basic Gencon form are inconsistent with the printed clause. The typewritten provisions found in the section of Clause 1 of the NICTRIC charter labelled "rate of freight" provide for "lumpsum" freight in U. S. currency, 90% to be prepaid and the balance payable upon completion of discharge. This type of an amendment is substituted for the original printing under which the owner was obligated to "deliver the cargo on being paid freight." This new typewritten clause making the balance of freight payable on completion of discharge, i.e., after the cargo has left the custody of the vessel, is totally inconsistent with owners looking first to a lien on the goods to pay the freight.

It is a fundamental rule of charter construction that the typewritten provisions take preference over the printed language. In *W. K. Niver Coal Co.* v. *Cheronea S. S. Co.*, 142 Fed. 402 (1st Cir. 1905), the Court held, at page 404:

> "Charters, like nearly all maritime documents, can be properly construed only when construed historically. The common practice when changes have been desired in charters, marine insurance policies, and other maritime documents, has been to insert into the old body a new clause supposed to have reference to the particular emergency which it concerned. Thus, it follows that inconsistent expressions are found in such documents; and so it is in the present case. Scrutton's Charter Parties and Bills of Lading (5th Ed. 1904) at page 22, pertinently says: 'It is unnecessary to find a meaning in the particular charter for every word of a com-

> mon printed form'. When a maritime document is studied historically, the necessity of complete reconcilement at time disappears, and what is introduced as new matter masters the rest of the document, on the same principle that written words master the rest of the printed blank deed, or contract, into which they have been inserted."

This same principle was followed by this Court in the *Robin Goodfellow,* 26 F.2d 343 (9th Cir. 1928) where the Court stated: (p. 344)

> "The Court below held that decision depended upon the meaning of Clause 15 and Addenda C, and that, if there was a conflict between the two, the latter should control, for the reason that Clause 15 was in a printed form of the charter parties, while Addenda C was a typewritten clause attached thereto. . . . There can be no question but that the trial court properly held that, in case of conflict between the printed clause and the written clause appended to the charter parties, the latter must prevail. In so holding the Court followed a familiar rule of construction, which scarcely needs a citation of authority."

The trial court applied these principles (R. 139, 140) and held that the specific language in the typewritten additions was such that Schnitzer, without qualification, agreed to pay the demurrage. Schnitzer contends (Br. 39) that these changes in the original printed form do not alter the operation of the cesser clause.

Schnitzer claims that the trial court misinterpreted Clause 7 by taking one of the portions of it out of context. A comparison between the original printed lan-

guage of the Gencon form of Clause 7 and the one used in the NICTRIC charter party shows that the trial court did not take a portion out of context but that the typewritten changes completely altered the pattern set forth in the printed form. Clause 7 of the printed form, which was stricken, read:

> "Ten running days on demurrage at the rate of $..... per day or pro rata for any part of a day, payable day by day, to be allowed merchants altogether at ports of loading and discharging."

As has been pointed out earlier, this printed language was consistent with the pattern of placing liability for demurrage upon the merchant receiver. However, in the NICTRIC voyage charter this pattern was changed by deleting it entirely and inserting:

> "Demurrage if incurred to be paid by charterers at the rate of Seven Hundred Dollars ($700.00) per day or pro rata for any part of a day."

Schnitzer claims, at page 40 of its brief, that the function of Clause 7 is not to allocate liability for demurrage but to agree upon the rate at which demurrage would be paid. If that were so, Schnitzer could have merely inserted the rate in the printed Gencon form and the rate would have been agreed upon. Instead, it chose to modify the Gencon form completely and to make an unqualified agreement to pay demurrage if incurred..

Turning to Clause 18, Schnitzer contends this does not modify the allocation of liability for demurrage as set forth in Clause 8. No matter how Schnitzer invents argument, the clear language of Clause 18 does change

the allocation of liability. Clause 18, just as Clause 7, states categorically, and without any qualification, the obligation of "charterers to pay demurrage." Clause 18 further adds that payments of demurrage or dispatch are to be made in the same currency as the freight payment which, as pointed out above, is required to be in U. S. currency by Clause 1.

Clause 18 likewise makes it clear that no distinction can be drawn between demurrage incurred at the port of loading and at the port of discharging inasmuch as this clause provides that "cargo is to loaded, stowed and *discharged*. . . ." It then continues "if longer detained, charterers to pay demurrage at the rate stipulated in Clause 7. . . ." And Schnitzer agreed to be responsible for the discharge in Clause 17.

The cases cited by Schnitzer add nothing to its argument. The English trial court decision in *"Z" Steamship Co., Ltd.* v. *Amtorg, New York,* 61 Lloyds List LR 97, (K. B. Div. 1938) concerned a charter which contained none of the typewritten language which is crucial in this case. All it did was contain an unmodified Gencon printed Clause 8.

The arbitration in the *Luossa,* 1936 A.M.C. 213, held the unmodified Clause 8 to be effective because "no evidence was submitted or argument made that the clause was ineffective for any reason whatsoever." The additions made to the Luossa charter did not relate to the applicability of Clause 8.

Schnitzer next contends that there is no evidence that it was responsible for the language of the voyage

charter (Br. 42). The trial court finding on this point is (R. 140):

> "The form of the contract, the language used, the deletions made and the endorsement attached are all chargeable to Schnitzer and I so find under the undisputed evidence before me. Therefore if ambiguity exists, which I do not believe, all doubt must be resolved against the author of the charter. Thomas Jordan, Inc. v. Mayron Drilling Mud, Cam & Eng'r Serv., 214 F2d 410 (5th Cir. 1954)."

This finding is amply supported in the evidence.

Dr. Leonard Schnitzer stated that he handled the negotiations on behalf of Schnitzer (Tr. 174).

He did this through his broker, Seacharter. The testimony of Dr. Leonard Schnitzer (Tr. 177) clearly shows it was Schnitzer that directed the form of voyage charter. Dr. Schnitzer testified:

> "I said 'Well' I said 'I've got another vessel'—I think it was the KEHREA—I said, 'This is a pretty uniform party and most of the standard conditions would apply in this particular case.' I said, *'If you want to use this as a form, on this basis we will pay* $63,000.00 *and that is it."* (Emphasis added)

In this negotiation there is no doubt that Seacharter Co., Inc. was acting as broker and agent for Schnitzer. This was the testimony of Mr. R. S. Kimberk in his deposition (Ex. 79). Although Schnitzer objected in the trial court to the admissibility of Mr. Kimberk's testimony, the objections were overruled and no error is assigned in this appeal based upon this ruling. Mr. Kimberk testified (p. 5):

"A. After the vessel had been chartered to Amtro Corporation, I had conversations with Mr. John Stewart of Amtro regarding his employment of that vessel. Following these conversations, I had further discussions with Mr. Jensen of Seacharter Company, Portland, with whom we were working on other business. He said he had arrangements with a firm in Portland whereby he could supply a cargo for the SS 'NICTRIC'.

Q. Mr. Kimberk, what was the name of this firm in Portland to which you referred?

A. Seacharter Company.

Q. And you stated that Seacharter had arrangement with a firm in Portland?

A. That's Schnitzer.

Q. Did Captain Jensen tell you what his connection was with Schnitzer?

A. He said that he was the exclusive agent for Schnitzer and had authority to arrange cargoes to be shipped by Schnitzer."

Mr. Kimberk testified concerning the beginning of negotiations to fix this charter and then confirmed that the final negotiations were conducted directly by Mr. Stewart, manager of Amtro.

The fact that Mr. Kimberk conducted the first part of the negotiations on behalf of Amtro was confirmed by Mr. Stewart (Tr. 34). On July 14, 1961 Seacharter sent Amtro a telegram setting forth the terms proposed for the charter (Ex. 51) as follows:

"Re various telephone conversations this morning your T/C vessel Nictric hereby accepted voyage charter to Schnitzer Steel Products under general Pacific Coast Scrap Charter Party with the fol-

lowing additional clauses one Port loading, one Port discharge, charterers option, loading Vancouver B. C. and/or Portland to one or more discharge Ports Kobe/Osaka, Tokyo/Yokohama. $2500.00 additional each loading and discharge port charterers option loading and discharge in or out of geographical rotation charterers option loading 1500 tons Turnings. Lay Days August 18 Sept. 3. Total Brokerage 3-¾ percent your guidance mailing today sample Charter Party. Mailing Monday complete written Charter Party for your acceptance.

Capt. John L. Jensen, Seacharter Co., Inc."

Subsequently, Seacharter wrote to Amtro enclosing a copy of the form used for the charter of the KEHREA (Ex. 76), the one mentioned in Dr. Schnitzer's testimony (Tr. 177).

Mr. Stewart further testified that upon receipt of the form of charter, he discussed the matter with Captain Jensen of Seacharter objecting to the form submitted (Tr. 37). But this was of no avail. Mr. Stewart testified he thereafter discussed his objections with one of the Schnitzer brothers whom he believed to be Morris Schnitzer. It was made quite clear by Dr. Leonard Schnitzer that if Amtro did not give them the vessel on his terms there was going to be a lawsuit, because he considered it chartered and fixed (Tr. 181).

Thus, the factual situation presented to the trial court showed that Schnitzer directed its agent, Seacharter to utilize the KEHREA form of charter. This form was utilized by Seacharter and sent to Amtro. When Amtro objected to the form of the charter,

Schnitzer threatened litigation if it were not promptly executed. This clear evidence amply justified the trial court's finding that "The form of the contract, the language used, the deletions made and the endorsement attached are all chargeable to Schnitzer and I so find under the undisputed evidence before me."

Schnitzer's claim that there is no evidence upon this point as raised in its brief at page 42 is completely without foundation.

Schnitzer next contends there is no evidence that Schnitzer agreed with the court's construction of the voyage charter (Br. 42).

The court's findings on this point are as follows (R. 140):

> "Aside from the views here expressed on the interpretation of the charter, I find a record which places Schnitzer in the indefensible position of first agreeing to pay demurrage, and later attempting to change its position. On November 13, 1961 when Schnitzer was first contacted by Amtro's counsel after the vessel had been on demurrage for about one month, Schnitzer agreed to pay demurrage, but objected to payment of that item and the balance of the freight until the completion of the discharge, on the ground that such items were not due under the charter until that time. This testimony of a Mr. Fletcher is uncontradicted. Subsequently, Schnitzer's counsel took the position that in fact there was no lien on the cargo for the demurrage. Schnitzer relied on this construction of the contract from about November 17th until after the cargo

had been discharged on December 31st. On December 7th, counsel advised Amtro that it would not comply with what Amtro thought was a firm agreement to pay a portion of the demurrage and arbitrate the disputed amounts. At this time Amtro was advised to take whatever remedies it thought it might have. On December 11th, Amtro advised Schnitzer that it probably could not exercise a lien on the cargo on account of Japan's peculiar laws and of the fact that considerable of the cargo had been discharged. On December 14th, by the libel in this case Owners advised Schnitzer that they had been unable to obtain payment of the demurrage by exercising a lien on the cargo. Until December 7th, it is quite clear that Schnitzer interpreted the contract in line with Amtro's and this Court's conclusions. A cable on August 11th indicated such an interpretation. A letter to Amtro on August 27th applied the same construction. One week later in an inter-office memo to its Tokyo office, Schnitzer conformed to this same interpretation. The record clearly shows that the indicated 'small fortune' was the sum being lost on demurrage. On all contracts with purchasers at the ports of discharge, the demurrage is for the sellers, i.e., Schnitzer's account with one exception. At Okaya, one purchaser agreed to pay his proportionate share of demurrage."

The record amply supports these findings. Mr. Fletcher testified (Tr. 104) as follows:

"The response I got from that cable or telegram was a telephone call on November 13, 1961. It was a telephone call in which I talked to Dr. Leonard Schnitzer and Kenneth Lewis. I believe that one or

the other of them placed the call but both of them were on the telephone. We talked about the cable. They told me they were going to pay the demurrage, but that the demurrage was not yet due; that the provision for payment of the demurrage day by day in the charter was crossed out, and that the balance of freight was not payable until the completion of discharge, and that the demurrage is treated the same way and that the demurrage was not due; that they were going to pay it but they were unwilling to prepay it."

The court found that Schnitzer's counsel took the same position. Mr. Fletcher (R. 107) testified:

"On the same day (November 17) Mr. Krause called me, or I called him—I don't recall—and we discussed the situation at some length. We discussed the problem in a series of telephone conversations, conversations between the 17th and the 27th. And during all of these conversations Mr. Krause told me that he had examined the charter; that I would notice that the provision for demurrage payable day by day had been crossed out; that I would notice, also, that the charter provided for the balance of freight payable after completion of discharge; that in his view demurrage was simply extended freight, and that, therefore, demurrage was not payable until the completion of discharge; and that if the bill was not payable until the completion of discharge we had no lien because you don't have a lien for something which is not yet due."

This testimony of Mr. Fletcher was never contradicted.

It is uncontradicted that on November 29 Schnitzer's counsel advised Amtro that he had been authorized by his client to accept the proposal which the attorneys had been discussing, namely, the payment of the demurrage except for Sundays and holidays and the arbitration of Sundays and holidays (Tr. 109).

This was further confirmed by Mr. Fletcher's testimony that on December 5 Mr. Fletcher was told by Schnitzer's counsel that he had talked to his client about the agreement and that it would be signed and the funds would be on their way immediately (Tr. 113).

It was not until December 7th that Schnitzer's counsel informed Amtro that Schnitzer was not going to go through with the agreement (Tr. 113).

But the negotiations did not end then. Mr. Lewis, Schnitzer's general counsel, went to Los Angeles on December 11th in an effort to settle the demurrage issue again. But Schnitzer and Amtro were unable to agree on the amount. It is clear that Mr. Lewis' visit to Los Angeles in no way questioned Schnitzer's liability for the demurrage but was merely haggling over the amount to be paid (Tr. 114, 115).

On December 12 Mr. Fletcher advised Mr. Lewis that his information was that it was impossible to exercise the lien at which point no further negotiations or discussions were promoted by Schnitzer (Tr. 115, 116).

Not only was Schnitzer indicating that it considered itself liable for demurrage throughout the negotiations covered in the testimony above, but Schnitzer had ear-

lier confirmed this interpretation in communicating with Amtro and with Schnitzer's Japanese office. This is contained in Exhibits 49, 53 and 54 as follows:

". . . EXTREMELY CONCERNED ABOUT NICTRIC DEMURRAGE AT YOUR END AS THIS VESSEL WILL DISCHARGE OSAKA/TOKYO BOTH IF DELAYED BOTH PLACES WE COULD HAVE TREMENDOUS DEMURRAGE BILL WHAT IS OUTLOOK ON DEMURRAGE FOR THIS VESSEL ADVISE IMMEDIATELY . . . "

(August 11, 1961 to Schnitzer Tokyo office) (Ex. 49)

"We have been losing heavily on several of our vessels because of these delays, and needless to say, we are as anxious as you to complete same." (October 17, 1961 letter to Amtro) (Ex. 53)

"4. Also, enclosed find photostatic copy of letter from AMTRO corporation, received earlier this week. These people are hotter than the dickens because they have to book a return cargo on the NICTRIC, and they don't know when we will finish discharging. They have to synchronize the loading of their cargo to our discharge of the vessel. When will the vessel go to berth? When will it finish discharging? We are losing a small fortune on this vessel. Would appreciate some answers. Anything you can do to expedite the matter will be of tremendous help."

(October 25, 1961 to Schnitzer's Tokyo office) (Ex. 54)

In the interoffice memo to its Japanese office (Ex. 53) Schnitzer indicated concern with "losing a small fortune on this vessel." The testimony of Dr. Leonard Schnitzer (Tr. 207-209) makes it abundantly clear that this "small fortune" was the sum being lost on demurrage, and it was so found by the trial court (R. 140).

Schnitzer's brief upon this point (Br. 42-46) makes no attempt to explain any of the above testimony but seeks to ignore it.

Instead, Schnitzer attempts to avoid the District Court finding of "a record which places Schnitzer in the indefensible position of first agreeing to pay demurrage, and later attempting to change its position" by pointing its finger at Amtro. Of course, Amtro in its desperate financial condition had no alternative available to obtain demurrage payments than to threaten to lien the cargo and such threats were made. But in answer to these threats, Schnitzer continued its position that it would pay the demurrage but that these sums were not yet due. This placed Amtro in a helpless posture and it became insolvent.

Schnitzer proceeds with its argument that Amtro's counsel consistently claimed the lien during his discussions with Schnitzer until it was clear that a lien could not be imposed on December 11. What Schnitzer does not quote in its argument is the uncontradicted testimony of Mr. Fletcher set forth above that Schnitzer was at all times agreeing to pay demurrage but objecting to payment of that item until the completion of discharge. At page 46 of its brief Schnitzer states

"Schnitzer never took the position that Amtro had no lien on the cargo." The uncontradicted testimony on this point appears in Mr. Fletcher's testimony (Tr. 107) and quoted above, and this uncontradicted testimony was accepted by the court.

The pleadings and the pre-trial order not only asserted the inability to obtain payment of the demurrage by exercising a lien on the cargo but also asserted Schnitzer's primary liability under the terms of the voyage charter (R. 5, Art. XVI; R. 16, par. IV; R. 39, Art. XV; R. 109, par. 9; R. 110, par, 2, 3, 4).

And the same contention is made in Paragraph IX which is:

> "IX. *Under the terms of said voyage charter* and in light of the circumstances then prevailing in the ports of Japan at the time said vessel was awaiting discharge and discharging Schnitzer remained liable to pay any and all demurrage which accrued." (Italics added)

These pretrial contentions on behalf of Owners quite clearly pleaded alternative relief, in the first instance alleging that Schnitzer was liable under the terms of the voyage charter and second, that in any event, it was impossible to exercise a lien upon this cargo under the circumstances then prevailing in Japan.

Schnitzer's final attack upon the trial court's interpretation of the voyage charter is upon the court's finding that the contracts between Schnitzer and its customers placed the responsibility upon Schnitzer for demurrage (R. 142, Br. 47).

Schnitzer mistakes the trial court's finding on this point. It claims the court found that all of Schnitzer's contracts for sale of cargo, with one exception, provided that liability for demurrage at the unloading port, as between Schnitzer and its buyers, was upon Schnitzer (S. Br. 47).

The Court's finding was (R. 142):

> "On all contracts with purchasers at the ports of discharge, the demurrage was for the seller's, i.e., Schnitzer's account, with one exception. At Okaya, one purchaser agreed to pay his proportionate share of demurrage."

What th Court found was that in only one contract (Okaya) (Ex. 112) did Schnitzer shift its burden of paying demurrage. The provisions of the Okaya contract (Ex. 112) spell out in considerable detail the demurrage obligation of the buyer.

> "5. DELIVERY: C & F Free Out Tokyo, Japan Buyer shall discharge at the rate of 150 long tons per workable hatch per WWSHEX, even if used. Waiting time of the vessel at discharging port shall be shared by us proportionally according to our invoice tonnage and total quantity. Time to count from 8:00 a.m. the following working day after due notice given; Notice of readiness to be given in writing during office hours. Time from noon Saturday to 8:00 a.m. Monday not to count, even if used. Any demurrage or despatch money according to the above calculation shall be for Buyer's account. Rate of demurrage/despatch to be $700—per day and half despatch."

The obligation assumed by Okaya is not the same as the charter terms in calculation of lay time, use of Saturdays and Sundays and despatch money, so that the application of the voyage charter calculations might result in an entirely different sum than what Okaya agreed to pay.

The Court's finding on this point is consistent with the other findings relating to Schnitzer's course of conduct interpreting the voyage charter to place the responsibility for demurrage upon Schnitzer. Had Schnitzer not realized its responsibility for demurrage, it would not have made the contract with Okaya in those terms.

The remaining contracts Schnitzer had with its customers were similar. The contract with Toyo Menka Kaisha, Ltd. (Ex. 16) contained this language:

> "7) Discharging: Discharging shall be made by Buyer for Buyer's account. Buyer guarantees customary quick despatch (C.Q.D.)."

It also contained as a price provision, C&F FO. When Dodwell & Co made demand upon this purchaser to pay demurrage (Deposition Ex. F-1) this customer replied (Deposition Ex. F-2):

> "In reply to your letter of November 27, 1961 concerning the payment of demurrage and freight on the captioned vessel, we would inform you that we bought our cargo from our shipper on the terms of C&F FO, which means that we have nothing to do with freight or demurrage.
>
> "Under the circumstances we regret we cannot take any action as requested."

The Mitsui contracts (Ex. 18, 19) were even clearer. They provided:

> *"Unloading*
> CQD (Liner term discharges except stevedoring charges are for buyer's a/c), therefore demurrage at discharging port is for seller's a/c."

Both of the Mitsui contracts were CIF FO Tokyo. Mitsui likewise rejected the proposal made by Dodwell (Deposition Ex. F-3).

All of the remaining contracts called for CIF FO with the exception of the Kuwamasi contract (Ex. 110, which, in addition, called for "Berth Terms."

Schnitzer argues that because the contracts place the burden of paying for the discharge on the buyer, this, in some manner, places the burden for demurrage also upon the buyer. No authority is cited on this point and the evidence quoted above is to the contrary.

The only obligation which a consignee assumes is to use reasonable diligence under the circumstances then prevailing. See Scrutton on Charter Parties (16th Ed.) p. 309:

> "The obligation, therefore, upon the charterer or consignee, where no fixed time for discharge is mentioned, is in all cases, that the ship is to be discharged as quickly as is consistent with the manner in which every vessel going to the port is discharged, and the existing circumstances at the time when the vessel actually comes to the port, so far as these circumstances are not caused by the charterer or consignee. It follows, that, with such an obligation in a charter party or bill of lading there

is no advantage in inserting exceptions affecting the obligations as to discharge though this is commonly done."

Schnitzer then argues that the inclusion of reference to the voyage charter in the bills of lading shifted the liability for demurrage to these customers. This is merely a re-argument of Schnitzer's first point on interpreting the voyage charter. As has been discussed above, the language of the voyage charter squarely places responsibility for demurrage upon Schnitzer. How could the incorporation into the bills of lading of Schnitzer's obligation for demurrage in any manner transfer that obligation to the customer? Obviously, it could not and Schnitzer, in only one of its contracts, expressly shifted this responsibility to its customer (Okaya Ex. 112).

Further, these contracts with the customers called for bills of lading marked "freight prepaid." Did Schnitzer want the vessel to lien the cargo for the unpaid freight under such circumstances? Clearly not, and the trial court properly held that Schnitzer's manner of handling its customers contracts was in accord with the interpretation of the voyage charter made by the court.

In summary upon Point I of Schnitzer's argument, an objective analysis of the voyage charter can lead to but one conclusion—that Schnitzer agreed, without qualification or ambiguity, to pay any demurrage which might be incurred under the voyage charter. Schnitzer, by its actions from the inception of the charter until the vessel was completely discharged, acted in accordance with this interpretation that it was responsible for de-

murrage but the demurrage was not payable until the discharge was completed. Schnitzer is fully chargeable with the authorship of the terms of the voyage charter, and should there be any ambiguity, which neither the court nor either of the other parties believe, such ambiguity should be resolved against Schnitzer. And finally, in its contracts with its customers and its dealings with its customers, Schnitzer recognized its responsibility for payment of the demurrage and balance of unpaid freight.

The District Court so found, based upon substantial evdence and should be affirmed.

II

ANSWER TO SCHNITZER'S GROUP II ARGUMENT

The Lien on Cargo Could Not Have Been Exercised.

The correct interpretation of the voyage charter made by the trial court disposes of the issue of Schnitzer's liability for demurrage and unpaid freight. But, despite this, even under Schnitzer's theory of the case, Schnitzer remained liable under the cesser clause (Clause 8) because the parties were unable to obtain payment of the unloading demurrage by exercising a lien on the cargo. The trial court took into account every proposition advanced by Schnitzer and held that a lien could not have been so exercised.

The District Court held (R. 142) that "Schnitzer's argument that Amtro made no attempt to enforce payment of the demurrage by exercising a lien is simply without foundation."

There is no dispute on the incredible congestion in Tokyo which caused the delay of the NICTRIC. As Captain Cassimatis testified (Ex. 47, p. 20):

"A. Well, it was a well-known fact throughout the shipping fraternity that the congestion of '61 never happened in the annals of Japan. There must have been around 300 ships at the time all over Japan staying between four months down to two months and even grain ships had to be delayed which always get preference.

Q. Was it the worst congestion you have ever seen in your shipping career?

A. That is correct.

Q. And the worst you ever heard about?

A. The worst I ever heard and the worst a lot of people with perhaps more experience than myself have ever seen or heard in Japan."

The Agency Japan Newsletter No. 2 published by PacMarine (Ex. F-23) also brings this out. At page 1, the heading of the Newsletter is:

"While there are many items of interest to shipowners and charterers to maintain this newsletter with general subjects, at the present time the single subject of paramount interest and importance to all concerned is that of CONGESTION, and we think it worthwhile to devote this issue solely to this one subject."

And at page 3:

"II. Present Position:

A) Degree of Congestion:

5) Tramp vessels discharging lumber, logs (into the water) or scrap into 'dirty cargo' lighters—great congestion ranging

from one week to three months' wait for berth and three weeks to one and one-half months for discharge."

And at page 4, under the heading of Causes:

"The main cause is the tremendous increase in the import of bulk commodities mentioned above.

The other more local causes are as follows:

a) Shortage of berths
b) Shortage of lighters
c) Shortage of warehouse space
d) Shortage of labor"

With reference to these shortages, the report continues (p. 5):

"(b) Lighters—Here we have a bad bottleneck, in that there are two types of lighters—clean cargo lighters for general cargo, import and export, grain, sugar, etc. Generally while these are short it is not catastrophic. The other—dirty cargo lighters are extremely short, partly in their own right and partly because of lack of areas into which they can discharge, causing much slower turnaround. The Government calculates that the ports are short of 250,000 tons of lighters, of which 60,000 each are in Tokyo and Yokohama.

(c) Warehouses—This business has been an excellent one since the war; space is normally short but now with the great splurge, the warehouses are pack-jammed, with shortage of labor to clear them and as a result cargo remains in lighters for undue time causing a snowballing effect. Shippers and consignees who usually use their own private warehouses now have them full with import cargo and have to use port warehouses which compounds the problem."

Schnitzer does not deny this incredible congestion. Instead, it attempts to misconstrue or belittle the testimony to argue that nothing was done to enforce a lien.

Under general maritime law, the lien of a vessel on cargo for freight and demurrage is possessory and is lost when the cargo is delivered to the consignees. *Bags of Linseed,* 17 L. Ed. 35; *Riley* v. *Cargo of Iron Pipes,* 40 Fed. 605; *The Guilio,* 34 Fed. 909; *Pioneer Fuel Co.* v. *McBrier,* 84 Fed. 495; *Costello* v. *Laths,* 44 Fed. 105; *In Re Bags of Malt,* 262 Fed. 946. Under this principle, to effect a lien upon the cargo, the vessel would have had to retain possession of the scrap, either in warehouse space ashore, on the lighter or on the ship itself.

The overwhelming evidence is that there was no warehouse space available, there were no lighters available, and that should the vessel attempt to keep the cargo aboard, it would have been ordered out of its turn at the buoy and placed again at the end of the line of ships awaiting their turn to discharge. See testimony of Main (Ex. 44G, p. 153, 154, 173), Saishoji (Ex. 44E, p. 23, 24, 25, 35, 57-59), Cassimatis (Ex. 47, p. 18-20, 53, 60).

It was simply not possible under the conditions then prevailing in Japan to exercise the lien. As Mr. Main testified (Ex. 44G, p. 173):

> "L.: Yes certainly. I want to know why you say it's not possible.
>
> "M.: Well, I say it was not possible because there was no storage space ashore, and, nor could we get barges to hold it in the barges or the lighters."

Schnitzer treats the testimony from Japan with all the technical niceties possible. Voluminous objections were presented to the trial court (R. 123) and patiently considered and disposed of (R. 184). In considering these objections the District Court had in mind the familiar admiralty practice. See Benedict on Admiralty, § 381 (b):

> 'Admiralty causes are tried by a single judge, without the aid of a jury. Hence the elaborate rules of evidence deemed necessary to protect the untrained jury are not required. Courts of admiralty are not bound by all the rules of evidence which are applied in court of common law and they may, where justice requires it, take notice of matters not strictly proved and may receive in evidence testimony which might not be admissible in other courts."

See also, *Waterman Steamship Corporation* v. *David,* 353 F.2d 660 (5th Cir., 1965); the *Denny,* 127 F.2d 404 (3rd Cir., 1942); *Westchester Fire Ins. Co.* v. *Buffalo H. & Salvage Co.,* 40 F. Supp. 378 (D.C. W.D. N.Y. 1941).

The testimony shows that Dodwell was, without doubt, the most experienced agent in Japan and handled by far the great majority of the vessels having delay and demurrage problems (Ex. 44G, p. 156, 157). It knew the practical day-to-day operational problems being encountered during this congestion. Dodwell's men testified that, based upon their expert knowledge of the conditions then existing in Tokyo, it was physically impossible to assert a lien upon this cargo by any of the

three methods suggested above for retention of a possessory lien (Ex. 44G, p. 161) (Ex. 44E, p. 140).

Not only did Dodwell so conclude, but also experienced maritime counsel in Japan likewise advised that it was not possible to exercise a lien under the conditions then present (Ex. 47, pp. 19, 48, 50, 60).

In summary, the owners' managing superintendent was personally present in Japan with his own observation of the tremendous congestion. The best and most experienced steamship agents in Japan were watching out for the vessel's interest to protect its demurrage claim. And the maritime attorneys, who for so long had looked after such matters for vessels of all nations, were consulted. All agreed it was impossible to exercise the lien. And the trial court so found.

Schnitzer stopped its negotiations with Amtro immediately when it learned that a lien could not be exercised. Mr. Lewis was so told by Mr. Fletcher. The original libel herein was filed on December 14, 1961 before all of the cargo had been removed.

Had Schnitzer honestly felt a lien could have been exercised, or had Schnitzer wanted to fix the demurrage expense upon the cargo receivers, why did Schnitzer not come forward with all the suggestions it made to the trial court, and now repeats to this Court, before the cargo was completely unloaded? Why did it not say "Keep some cargo aboard," or "Go to Harumi Wharf," or suggest some bonded storage areas? Schnitzer not only had an office and personal representative in Japan, but it also had appointed the vessel's agent, Pac-

Marine. If the knowledge of PacMarine was superior to that of Dodwell and had Schnitzer wanted to place this liability upon its customers, why was this superior information not given to Amtro, especially as PacMarine was supposed to be agent for both Schnitzer and Amtro? The only answer is that Schnitzer was not interested in placing this liability upon its customers. When it learned of the congestion and the impossibility of exercising the lien, Schnitzer saw the situation as an opportunity of avoiding the demurrage claims entirely.

Turning to Schnitzer's specific suggestions of how the lien could have been exercised, the trial court found that the idea of retaining some cargo on board was not practical (R. 142). It held that the ship risked not only the possibility, but also the probability of being moved by the harbor authorities and sent to anchor outside to await another turn at discharge. This would further delay the ship for an indefinite period to such an extent that no one could predict what the ultimate demurrage bill would be. Both Main (Ex. 44G, p. 160) and Saishoji (Ex. 44E, pp. 24-25, 57-59) testified that the ship would undoubtedly have been forced to move from its discharging buoy if it had attempted to exercise its lien by stopping discharge. All Schnitzer does is argue that it should have been tried to see what would happen. Common sense alone dictates that the harbor authorities in Japan would not have permitted an idle ship to hold up the long line of waiting vessels.

Schnitzer challenges the ruling of the District Court that the NICTRIC could have been moved to another

wharf and the lien exercised there (R. 143). This was referred to as the Harumi wharf. Schnitzer's own witness, Koizumi of PacMarine (Ex. 44H), provides evidentiary support for this finding against Schnitzer's claim. This man was acting under Schnitzer's appointment as its agent (Ex. 44H, pp. 187-8) and testified on this point (Ex. 44H, p. 187-11):

> "B: What about the Harumi wharf that you have been talking about why didn't you make an effort to engage that wharf?
>
> "K: We couldn't do that.
>
> "B: Why not?
>
> "K: The reason is because we couldn't discharge in seven days. I mean on the whole cargo I am talking about."

He never made any effort to put the vessel at Harumi wharf (Ex. 44H, p. 187-18).

Ex. B-11 produced in Morgan's deposition (Ex. 44F, p. 89) is consistent with this testimony of Koizumi. Morgan wrote (Ex. B-11, p. 1):

> "During my visit to Tokyo in the period 21st October to 8th November, Schnitzer Steel Products' Tokyo representative, Mr. Morgulis, had been endeavoring to arrange for the NICTRIC to discharge out of turn at a special quick discharge berth, but subsequently gave up the idea because of the NICTRIC's varied types of scrap cargo which would not admit of completion within seven days."

This is a statement attributed to Schnitzer's admitted agent, Morgulis, and certainly is not hearsay against Schnitzer. Morgulis was present at the depositions in

Japan (Ex. 44D, p. 34) and could have denied that statement attributed to him had it been untrue. Morgulis, significantly, was not called as a witness by Schnitzer.

Schnitzer also challenges the District Court's finding that there were no areas ashore where the scrap could have been stored (R. 143). The complete lack of such storage facilities was told by Main (Ex. 44G, pp. 153-4, 173) and Saishoji (Ex. 44E, p. 23). Only Koizumi in response to hypothetical questions felt he could have found some space ashore. But Koizumi's testimony on this point also is suspect for two reasons—(a) he was the agent of the vessel at the time of discharge and did not suggest any such areas at the time, and (b) his own company's reports (Ex. F-23) quite clearly stated there was no space ashore.

Schnitzer objects to Ex. F-23, but its own witness Koizumi said the report was put together by his company as the best information it had based on matters with which it dealt daily (Ex. 44H, p. 187-24, 25). If for no other purpose it was admissible to impeach Koizumi's direct testimony. It was also a normal business trade information bulletin designed to inform people of the actual conditions (Ex. 44H, p. 187-24).

All of the "possibilities" suggested by Schnitzer in its hypothetical questions to Koizumi and its arguments are thus demonstrably false and implausible. The District Court so ruled.

Schnitzer challenges the Court's finding that the Japanese statutory lien could not have been exercised

because delivery had been made to third party purchasers from the consignees and not to the consignees (R. 143). It is Schnitzer's contention the Japanese law permits a shipowner to pursue the goods in the hands of a consignee for a period of two weeks after delivery (Br. 71). That, however, was impossible here because delivery was made directly to third parties. See testimony of Yoshida (Ex. 44B), Kayashima (Ex. 44C) and Hayashibara (Ex. 44D).

The exhibits produced at the trial further show that these deliveries were made to other than the consignees named in the bills of lading. These outturn survey reports show, in every instance, that at the time of inspection all of the scrap was in the hands of third parties and not in the hand of consignees. These outturn survey reports are as follows:

Exhibit #23 Japanese survey—Iwai discharge

"(b) Place and date of inspection:

At the landing place of Tokyo Steel Mfg. Co., Ltd., Tokyo on Dec. 30, 1961

"Consignee: Iwai
Consumer: Tokyo Steel Manufacturing Co., Ltd."

Exhibit #24A Japanese survey—Toyo Menka discharge

"(b) Place and date of inspection:

At the landing places of Fuji Shokai K. K., Shibaura & Shinonome, Tokyo on Jan. 6 and 9, 1962

"Consignee: Toyo Menka
Consumer: Fuji Shokai K. K."

Exhibit #24 B Japanese survey—Toyo Menka discharge

"(b) Place and date of inspection:

At the landing places of Harumi, Shibaura and consumers' yards in Tokyo on Dec. 9, 1961 and subsequent dates

"Consignee: Toyo Menka
Consumer: Fuji Shokai K. K."

Exhibit #25 Japanese survey—Okaya discharge

"(b) Place and date of inspection:

At the Toyohashi Works of the Tohto Seiko Kaisha, Ltd., on November 20, 1961 and subsequent dates."

"Consignee: Okaya
Consumers: Tohto Seiko Kaisha, Ltd."

Exhibit #26 Japanese survey—Mitsui

"(b) Place and date of inspection:

At the loading place of Harumi, Tokyo and consumers' yard Kawaguchi Saitama Pref. on Dec. 6, 1961 and subsequent dates:

"Consignee: Mitsui
Consumers: Messrs.—Nakadaya Shoten
Kogai Kogyo K. K."

Exhibit #27 Same as Exhibit #26 above

Exhibit #29 Far East Superintendency Co., Ltd., Surveyer—Namura Trading Co., Ltd.—New America discharge

"This is to certify that we attended at Tokyo port on December 23, 24, 25, 27, 28 and 29, 1961 and

at the premises of Asahi Sanbashi, of Suzue Gumi Warehouse, Harumi, Tokyo, and at the receivers' premises in Kawaguchi on December 27, 28, 29 and 30, 1961 and on January 6, 7 and 8, 1962, for the purposes of viewing the discharge landing and weighing and inspecting the following:"

Schnitzer argues that these outturn survey reports are not evidence of the passing of title. This is not the point. The evidence introduced by Schnitzer of Japanese law is that the lien may be pursued if the goods are in the hands of the consignee. These outturn reports show that the goods were not in the hands of the consignee but were in the hands of third parties.

In continuing the challenges to every ruling made by the District Court, Schnitzer complains of the decision that Amtro was not in a position to effectively assert its lien on account of the representation of Schnitzer that the demurrage and unpaid freight would be paid.

Owners take the position that the facts discussed above show quite conclusively that payment of the demurrage could not be obtained by exercising a lien on the cargo. Regardless of the representations made by Schnitzer to Amtro, the lien simply could not have been exercised under the circumstances then prevailing in Japan.

Had the circumstances in Japan been different so that a lien could have been effectively asserted, Schnitzer's representations were such as to place Amtro in an untenable position. And this was the finding of the trial court as an additional reason for holding Schnitzer liable for the demurrage and unpaid freight.

The uncontradicted testimony of Mr. Fletcher is (Tr. 104-105):

> "They (Schnitzer) told me that they were going to pay the demurrage, but that the demurrage was not yet due . . . and that the balance of freight was not payable until the completion of discharge, and that the demurrage was treated the same way and that the demurrage was not due; that they were going to pay it, but they were unwilling to prepay it. I told them that we had to have some guarantee for this payment if we were not to go ahead with the lien. They said they would guarantee it."

And again (Tr. 107):

> "And during all of these conversations Mr. Krause told me that he had examined the charter; that I would notice that the provision for demurrage payable day by day had been crossed out; that I would notice, also, that the charter provided for the balance of freight payable after the completion of discharge; that in his view the demurrage was simply extended freight, and that, therefore, demurrage was not payable until the completion of discharge; and that if the bill was not payable until the completion of discharge we had no lien because you don't have a lien for something which is not yet due."

In its brief, Schnitzer misconstrues the testimony of Mr. Fletcher (Tr. 113) in which Mr. Fletcher quoted Mr. Krause stating that his clients were not going to go through with the agreement. This was the agreement described earlier by Mr. Fletcher as the agreement to pay demurrage except for Sundays and holidays (Tr. 109).

Mr. Krause did not, as Schnitzer claims in its brief, decline responsibility. This is further supported by Mr. Lewis' trip to Los Angeles on December 11 and the continued negotiation between Amtro and Schnitzer at that point. This is further amplified clearly in Mr. Krause' letter (Ex. 34) taking the position that no lien could be asserted against the cargo and that nothing was due by way of demurrage or unpaid freight prior to discharge of the vessel.

It was not until December 29 that Schnitzer denied all liability for demurrage and freight as shown on Exhibit 61.

With this state of the record the court quite properly concluded that Amtro was not in a position to effectively assert its lien on account of the representations of Schnitzer that the demurrage and unpaid freight would be paid.

In summary upon this point, Owners submit the trial court was fully supported in its conclusion that even if Clause 8 remained in full force and effect, not modified by the typewritten language, the lien could not have been exercised in Japan under the circumstances then prevailing. Owner's had their marine superintendent personally present in Japan. The best and most experienced steamship agents were watching out to protect the demurrage claim. Maritime attorneys in Japan were consulted. All agreed it was not possible to exercise the lien. Only Koizumi provided some speculative possibilities, but none of the possibilities was given to Amtro or Owners when the NICTRIC was in Japan.

III

ANSWER TO SCHNITZER'S POINT III

Once on Demurrage, the Demurrage Runs Continuously

Schnitzer's third point on appeal is that the trial court rejected Schnitzer's contention that the time from noon Saturday until 8 a.m. Monday should be excluded from the calculation of the demurrage. The court's holding is clearly in accord with the law, and Schnitzer cites no authorities in opposition. The leading case is *Berwind-White Coal Mining Co.* v. *Solleveld, etc.,* 11 F.2d 80 (4th Cir. 1926), in which the Court said:

> "As to the first proposition, the rule is that, after demurrage has commenced to run, it will not be suspended by the occurrence of an event within the exceptions of the loading cause. Washington Marine Co. v. Rainier Mill & Lumber Co. (D. C.) 198 F. 142; The Oluf (C. C.) 19 F. 459; Lindsay v. Cusimano (C. C.) 12 F. 504; James v. Brophy, 71 F. 310, 18 C. C. A. 49; Baldwin v. Sullivan, 36 N. E. 1060, 142 N. Y. 279; Uulster Brick Co. v. Murtha, 154 N. Y. S. 834, 169 App. Div. 151; Scrutton on Charter Parties and Bills of Lading (11th Ed.) 342; Poor on Charter Parties 349; Carver, Carriage by Sea (5th Ed.) 258c. In MacLachlan's Law of Merchant Shipping (5th Ed.) p. 589, it is said: 'Unless the contrary be clearly stipulated, time runs continuously for the payment of demurrage without regard to day or night or nonworking days.' "

This is also the position of the leading American text on the subject—Poor on Charter Parties and Ocean Bills of Lading, § 49, p. 118, in which the author states:

> "Once the laydays have expired, and the ship is on demurrage, the demurrage days run continuously. The exception of Sundays, holidays, strikes, etc. is no longer of any value. This is for the reason that the charterer is considered as having failed in his duty by not having loaded the ship in the layday."

As has been pointed out above, the trial court was correct in attributing the authorship of the form of the voyage charter to Schnitzer so that if there is any ambiguity, which Owners contend there is not, the ambiguity must be resolved against Schnitzer. There is no clear stipulation that weekends should be excluded from demurrage contrary to the established practice of the shipping business and contrary to the authorities quoted above.

IV

ANSWER TO AMTRO'S POINT III

Trial Court Properly Construed Clause 23 of Time Charter Relating to Crew Overtime

The District Court construed Clause 23 of the time charter (R. 133-134) to mean that the parties intended a flat $350 per month, or pro rata for a partial month, regardless of the actual amount of overtime consumed. This finding was based upon an analysis of Clause 23 in its original printed form and as it was changed by interlineation, together with the testimony of Captain Cassimatis, the only witness who discussed this point.

As the District Court said, it is of vital significance that the parties eliminated the printed language which

read "Officers, engineers, winchmen, deckhands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles." In lieu of that language, the parties agreed that the charterer would pay "$350 per month or pro rata in lieu of all overtime."

The interpretation urged by Amtro of the foregoing language is that the overtime sum should be calculated only during the periods of loading and discharge. Should this interpretation be correct, then there would have been no necessity for the parties to eliminate the printed language and substitute the new language.

The reason for this amendment to Clause 23 and its development in the field of chartering were explained by Captain Cassimatis in his deposition (Ex. 47, pp. 12-16). Captain Cassimatis' qualifications in this field were not disputed, and he testified (Ex. 47, p. 12):

> "Now, to us it was a question of sometimes the captains wanted to charge more overtime or some of the mates would charge more overtime, and some of the time charterers were a bit stingy and they were arguing about the amount of overtime presented, so somebody thought to make it in a lump sum; and it must be about five or six years, perhaps ten years, no more, that somebody thought of this practice of a lump sum, and since then most of the time charter, charter parties, express the overtime in a lump sum and avoid all this argument about the hours and about whether it was due or whether it was not due.
>
> Q. Now, under the old form that you described was it necessary to make an actual accounting of

the overtime that was actually worked?

A. Actual accounting, yes, sir.

Q. And then settle that between the time charterers and the others?

A. That's right. You had to write everything, the time, the kind of work, the nature of the work, and all sorts of things.

Q. So to avoid that, this clause was devised to in effect settle in advance that argument?

A. Settle in advance, yes, sir.

Q. So that instead of computing the actual overtime a lump sum of so much per month was agreed upon?

A. That is correct.

Q. Whether overtime was worked or not?

A. That is correct."

This testimony of Captain Cassimatis was not challenged by any testimony or exhibits by Amtro, but only by argument. Thus, his testimony stands undisputed and is in accord with the change made by the parties from the printed language of the time charter to the interlineation as pointed out above.

In its brief, Amtro repeats its contention that the $350 per month payment is applicable only during periods of loading and discharge and merely substitutes the sum of $350 per month, or pro rata, for the actual hourly rates of the various employees who might be working the overtime. Again, Captain Cassimatis' testimony clearly showed the contrary (Ex. 47, p. 15):

"If you like me to expound on this thing, Mr. Tatum, take an example of a ship which loads scrap iron in Boston or in Portland, Maine and she is a

slow boat. She may take 45 days to go to Japan and then there is a bit of congestion and she stays 20 days outside in the anchorage. So actually the ship is getting two months' overtime for nothing. It appears that it gets the money for nothing, but on the other hand, she may go into Japan on the charter and it happens to be the Holy Week, which the crews are supposed to get three days' holidays, and the Japanese are working day and night so you've got to pay perhaps double the amount of what you should in overtime. But this is a question which works itself out with the law of averages. But as long as it takes two months from Portland, Maine to Japan there was never a case of a time charterer saying 'Because the ship was at sea and the ship is not doing anything for us more than the routine duty of sailing we won't pay overtime'. There is no such a case to my knowledge."

The trial court should be affirmed on this point and the judgment in favor of Owners against Amtro should be upheld.

CONCLUSION

It is respectfully submitted that the District Court should be affirmed. It correctly interpreted the provisions of the voyage charter to place responsibility for demurrage and unpaid freight upon Schnitzer. Having seen and heard the witnesses from Amtro, Schnitzer and Seacharter Co., Inc. the trial court found Schnitzer to be the author of the voyage charter and that Schnitzer itself interpreted the voyage charter to impose liability upon Schnitzer for the demurrage and unpaid freight.

Even under Schnitzer's theory of the case, it cannot escape payment because the incredible congestion in Japan prevented the exercise of a lien upon the cargo. The District Court properly held that once the vessel went on demurrage, laytime exclusions are of no further effect. Amtro's claim with reference to the overtime clause of the voyage charter is without merit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

LOFTON L. TATUM